IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION
Civ. No. B 038975
(Super. Crt. No. C420153)

CHURCH OF SCIENTOLOGY OF CALIFORNIA
and MARY SUE HUBBARD

Appellants,

-against-

GERALD ARMSTRONG,

Defendant.

8-16-91

BENT CORYDON,

Respondent.

Appeal from Superior Court of California
County of Los Angeles
Judge Bruce R. Geernaert

THIRD PARTY BENT CORYDON'S PETITION FOR REHEARING

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PETITION FOR REHEARING

Bent Corydon respectfully asks this court for a rehearing of argument in light of its decision, filed July 29, 1991, reversing the order of Judge Bruce Geernaert unsealing the court files in this case. Although the right of the public to have access to court files was confirmed in the decision as a highly valued right, nevertheless, the decision deprives the public of any usable mechanism to enforce that right. It reaches this result relying on a procedural issue that was not briefed in the proceedings in the trial court and was not a basis of the argument of the Church of Scientology of California in its appeal to the court. Consequently, this issue was not briefed by Corydon. Under these circumstances, the court was not given the benefit of a full examination of the determinative issue.

The court premised its decision on the procedural requirements of C.C.P. section 1008, a section dealing with motions for reconsideration sought by parties to a proceeding wherein the parties had notice of both the original motion and of the order for which reconsideration is sought. Yet the court has applied that section and its time limitations to the public in general and particularly to Bent Corydon, who was not a party to the litigation when the order for which reconsideration was sought was issued. In so doing the court held that a non-party is subject to the procedural requirements that control the law and motion practice by parties who have been given timely notice of motions and of the issuance of orders so as to bar the non-

party and the public at large from seeking review of an order adverse to the right of the public. Thus, even though no member of the public can enforce his/her interest in access to the sealed court files other than to file a motion as did Corydon in this instance, and even though the public had no notice of the possibility of its rights being abrogated nor any notice within the meaning of C.C.P. 1008 of the sealing order itself, the court's decision requires that Corydon be subject to procedural rules as if he were a party. By ruling in this way, the court has affirmed the existence of the public's right of access to court files but has, at the same time, denied it any remedy to enforce that right.

In addition to relying upon the time restraints of C.C.P 1008, the court also addressed a corollary aspect of a section 1008 motion, that is, that a second judge can not reconsider a prior order of another judge of the court. However, the court did not consider the undisputed statements in record to the effect that the judge who granted the sealing order in 1986, the Honorable Paul Breckenridge, had retired prior to the time that the motion for unsealing was brought in November of 1988. Consequently, and in accordance with numerous prior decisions of the courts of appeal of California, including the Second District, the one-judge rule does not apply in this case. Ziller Electronics Lab v. Superior Court (1988) 206 Cal. App.3d 1222, 254 Cal. Rptr 410. In addition, the judicial concern for orderliness in judicial proceedings that is pertinent when there

is a change in the identity of the law and motion judge or when the case is assigned to a different judge for trial is not applicable here.

The principal concern underlying the general rule that a second judge can not reconsider another judge's order is that parties should not be able to use the serendipitous event of a change in the identity of the sitting judge to seek review of the prior adverse rulings of the court. Such opportunity would wreak havoc upon the orderly progress of superior court proceedings and would the unsettle the finality of rulings essential to the progress of a lawsuit. The parties would routinely request that the judge to whom a lawsuit is assigned for trial reconsider key rulings of the law and motion judge.

The case at bar does not implicate this concern. First, in this situation, a non-party sought reconsideration of an order affecting the public's rights--not an order adverse to the interests of one of the parties. And, the reconsideration was sought after a settlement had been reached. Accordingly, the concerns for the orderly procedure during the pendency of a lawsuit are not compromised by permitting a reconsideration by a different judge.

Another significant distinction raised by the application of the one-judge rule is that a litigant aggrieved by a court order who does not meet the criteria for reconsideration under C.C.P. 1008 has other means for protecting its interest: it has the opportunity to petition for the review of an adverse ruling

during the pendency of the action, and, it can also file an appeal at the appropriate time. Thus, an erroneous ruling is not necessarily determinative. On the other hand, the non-party member of the public has no mechanism to challenge the adverse determination other than by a motion as was filed in this instance. Accordingly, while the rule respecting the identity of the judge is appropriate as to parties, the underlying purpose of the rule is not applicable to the unique circumstances present on a motion to unseal an improperly sealed file.

Although the Church of Scientology argued throughout these proceedings that the sealing order of Judge Breckenridge should not be disturbed, a review of the briefs demonstrates that its principal concern was that it felt it had a right to rely on the sealing order as a matter of contract, that is, that it had reached a settlement with Armstrong which required the sealing of the file as part a condition of the settlement. It did <u>not</u> argue the section 1008 issue as to the time standards under which motions for reconsideration must be filed within ten days of notice of the ruling. And there was scant attention given to the question of whether the problem with the reconsideration by a different judge after Judge Breckenridge's retirement was the concern for orderly procedure. Rather the Church's argument was that the sealing of the court file was part of its bargained for settlement terms and that the unsealing would undo the settlement. Thus, their argument principally was that reconsideration by any judge, even the original judge, was

inappropriate under any circumstances. However, this argument does not address the procedural mandate of 1008 that the reconsideration be by the same judge.

Finally, the court also commented that the use of C.C.P. 473 was available to Corydon for seeking relief from the sealing order. However, as with section 1008, that procedure also applies to parties to a proceeding. It provides a means of relief to a party where an adverse ruling was entered as a result of the neglect or inadvertence of his attorney. It simply has no applicability to the non-party situation.

As the Church did not address the procedural specifics of either C.C.P. 1008 or 473 in its argument to the trial court or to this court, Corydon did not brief that issue. The sole reference to this ground of decision was raised for the first time by this court during oral argument--a circumstance which did not allow for counsel to provide a reasoned, effective challenge to the applicability of the standards used on motions brought under C.C.P 1008.

Given the absence of thorough argument on the issue which the court deemed determinative, and furthermore, given that Corydon contends that such argument will demonstrate that the section 1008 or 473 standards are not appropriate in the present context, he requests that the court permit rehearing of these issues.

In summary, Corydon requests the court to rehear this matter because the right of public access to court files, a right

cherished in American jurisprudence, should not be rendered unenforceable by virtue of an incomplete examination of the applicable law. The bases for this petition are more fully set forth in the discussion, infra.

ARGUMENT

It is black letter law, indeed, it is uncontrovertible constitutional law, that the validity of judicial determinations affecting the rights of litigants are rooted in the requirement of prior notice. Notice requires both that the party affected be summoned to the court through appropriate process and also that he have specific notice of any order sought after he has appeared in the action. See eg. C.C.P. 1010. Thus, general notice of the pendency of a proceeding is not adequate to bind a party who had no notice of specific motions or orders. Nevertheless, the court's decision in the case at bar applies the procedures applicable to parties to others who are not parties, and in addition, the decision would apply those procedures without consideration of whether those non-parties had knowledge of the order for which a reconsideration is sought.

A review of the language of C.C.P. 1008 should dispel any doubt that its function is limited to litigants who were parties to a proceeding at the time of an order. The applicable paragraph states:

> "(a) When an application for an order has been made to judge or to a court,...any party affected by the order may, within ten (10) days after knowledge of the order and based upon an alleged different state of facts may make application to the same judge who made the order to reconsider that matter and modify, amend or revoke the prior order."

This language necessarily invokes the prerequisite of notice in several particulars. First, of course, the parties had notice of the litigation by virtue being served with process, or, if the

aggrieved party is the plaintiff, by having consented to the jurisdiction of the court. Second, the parties had specific notice of the application for an order since notice of such application must always be given, see C.C.P. 1010, and even orders issued ex parte must have been noticed pursuant to the applicable rules. Finally, under section 1008 a party is required to have knowledge of the order before the ten day period begins to run on his right to seek reconsideration. This knowledge may be obtained through actual notice of the issuance of the order by presence in court, or more typically, by service of a notice of ruling.

As a non-party, Corydon is not charged with notice of the pendency of the proceeding at the time of the matter for which he sought reconsideration below. Furthermore, there is no indication in the record that the sealing order in this case was the result of a noticed motion. And, of course, even if it had been the result of a noticed motion, neither Corydon nor any other member of the public would have been entitled to notice. Additionally, Corydon would not have been entitled to notice of the sealing order. Accordingly, the ten day rule of C.C.P. 1008 can not be applied to bar the motion to unseal.

A review of the terms and conditions of C.C.P. 1008 provide another basis for rejecting its applicability to the case at bar. Specifically, that rule requires that a motion for reconsideration be supported by evidence of a "different state of facts." However, as is typical of most cases in which the court

files are sealed, this file was sealed pursuant to a stipulation of the parties as part of their settlement. And, as of the time that Corydon filed his motion to unseal file, there was no change in that state of facts. However, public's right to unseal files, if it is to be enforceable, needs to be examined in spite of the fact that there is no change in the facts as known to the parties prior to the filing of the motion for unsealing.[1]

Lastly, we turn to the requirement that the application for reconsideration be brought before the same judge.

Although there is powerful judicial policy behind the requirement that orders, once made, can not be reconsidered except by the same judge, that policy gives way when the original judge is unavailable. This rule was reiterated by the Second District Court of Appeal in 1988, with the support of much California precedent, in Ziller, supra. The court stated:

> "An established exception to the general rule limiting reconsideration is that where the judge who made the initial ruling is unavailable to reconsider the motion a different judge may entertain the reconsideration motion. New Tech Developments v. Bynamics, Inc. (1987) 191 Cal. App3d. 1065, 1068-1070, 236 Cal. Rptr. 746. This exception reconciles the jurisdiction of a trial court to reconsider and correct its erroneous interim rulings to achieve justice, Harth v. Ten Eyck (1941) 16 Cal.2d 829, 8833-834, 108 P.2d 675, with the general rule's recognition of the comity between judges of a trial court." Id. at 1232.

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[1]Arguably, the filing of the motion to unseal is a "different state of facts." However, the existence of the public's right of access is a factor which was present at the time of the original order even though it if it was not expressed or considered at that time.

The exception noted in Ziller is a concrete example of how the dictates of the rule of C.C.P. 1008 must give way where its function is not served. Where the first judge is unavailable because of retirement, as in this case, or elevation to a higher court, that should not bar the exercise of the court of its inherent power to correct its prior rulings. And, since it is undisputed in this case (and, indeed, is not disputable) that Judge Paul Breckenridge retired prior to Corydon's November 1988 motion, the exception applies in this case.

This court's ruling recognized the basic concept of Fallon v. Superior Court (1939) 33 Cal. App.2d 48, 53, specifically, that the requirements of section 1008 protect the needs of litigants and the court system for an orderly process pendente lite. Id. at 53. However, in addition to the foregoing indications that that section is not applicable to the present situation, Fallon demonstrates how yet another of the fundamental premises of CCP 1008 are not found in the circumstances presented by a motion to unseal. Specifically, in Fallon, supra the court pointed out that there is a safeguard available for parties who would like to seek reconsideration of a prior ruling but who do not meet the test of CCP 1008, namely, the opportunity available to parties to file a writ or an appeal of the erroneous ruling at the appropriate time. In contrast, the member of the public who seeks reconsideration of a sealing order has no right to file an appeal of the original order. Thus, although the process of appellate review stands as a safeguard to parties, there is no

similar protection available to the member of the public injured by the sealing of the file.

In summary, C.C.P. 1008 expressly applies only to the parties to a lawsuit. Its requirements are properly applied to the parties to a lawsuit who have notice of the proceedings, of the motions therein and of the orders of the court. Each of those requirements -- that the motion be brought within ten days of knowledge of the ruling, that the motion allege a different state of facts, and that the motion be heard by the same judge -- speaks to issues that are not germane in the case at bar. And, in the case of the same judge rule, it addresses an issue which has been subject to an exception on the same facts as a presented by the present case.

Finally, the court mentioned briefly the availability of relief under section 473 of the Code of Civil Procedure. However, as with section 1008, that section deals with parties aggrieved by rulings. Indeed, it specifically makes references to the mistakes or errors made by the parties or by their attorneys of record for which relief is sought. Clearly, as Corydon was not a party and was not represented in any way in the litigation and, furthermore, since neither his acts nor his omissions led to the sealing order, the section is applicable on its terms to the issue at hand.

CONCLUSION

It is a well-known maxim that there can be no right without a remedy. McNeel v. Borland (1893) 23 Cal. 144. Yet the court's

decision deprives a member of the public the right to seek to unseal an improperly sealed file because it has invoked a procedure which is not applicable to non-parties.

Even if the rules invoked by the court represented valid concerns in the case at bar, the court has the inherent power to provide the remedy needed to implement the public's right of access to the court file. Indeed, since the power to seal a file is invoked by the inherent power of the court to control its records, similarly, the inherent power of the court can be used to define a procedure that will protect the right, acknowledged by the court, of public access to court files.

Corydon asks the court to rehear this case so that, with a more complete record, it can examine whether the limitations invoked by the court are applicable to non-parties, and, if necessary, to fashion a means for protecting the right of the public to seek access to improperly closed court files under procedures that are reasonable for this purpose.

DATE: August 13, 1991

Toby L. Plevin
Attorney for Bent Corydon

AMENDED PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS

I am a resident of the county of Los Angeles; I an over the age of eighteen years and am not a party to the within entitled action; my business address is 10700 Santa Monica Blvd, Suite 4-300, Westwood, California 90025.

On August 13, 1991, I served Bent Corydon's Petition for Rehearing upon interested parties in this action by placing a true copy thereof in sealed envelop(s) addressed as follows:

Eric Lieberman
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The Honorable Bruce Geernaert
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Except for the envelope to Bowles & Moxon, which I caused to be delivered by hand this date, the above were served by mail. I am fully familiar with my office's mail collection and preparation practices and procedures and I deposited said envelop(s) in accordance with my office's mail pick-up procedure for delivery on the same day to the U.S. mail with first class postage.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed at Los Angeles, California on August 13, 1991.

Toby L. Plevin